No. 93-1349

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

DAVID L. RAMSEY, SECRETARY, DEPARTMENT OF HEALTH AND HOSPITALS, STATE OF LOUISIANA, *et al.*,
Petitioners,

v.

ABBEVILLE GENERAL HOSPITAL, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For the Fifth Circuit

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REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

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1. Forty-three States, joined by the District of Columbia and the Territory of Guam, have filed a brief as *amici curiae* supporting petitioners. The *amici* States urge the Court to reconsider its decision in *Wilder* v. *Virginia Hospital Association*, 496 U.S. 498 (1990), and further state that "if *Wilder* is not overruled, it is urgently important that this Court clarify the standard of judicial review to be applied in Boren Amendment cases . . . [and] provide guidance to the lower courts concerning the content of the procedural 'finding' requirement of the Boren Amendment." States' Br. 12-13.

The States' Brief removes any possible doubt about the importance of the questions presented in this case. Forty-three States believe that judicial application of the Boren Amendment "has gone terribly wrong" and "now poses a serious threat to the States' administration of the Medicaid program." States' Br. 3. The *amici* States offer striking examples of the pathological quality of recent Boren Amendment litigation. *Id.* at 6-9. Because Medicaid is a cooperative federal-state program that accounts for a large percentage of the States' total spending, see *id.* at 2, the States' Brief weighs heavily in favor of granting the petition.

2. Respondents assert (Br. in Opp. 20) that there is no disagreement in the courts of appeals concerning the content of the procedural "findings" requirement of the Boren Amendment or the applicable standard of judicial review. That is not so. The lower court itself recognized (Pet. App. 8a n.7) that its ruling on the standard of review conflicts with the Seventh Circuit's decision in *Illinois Health Care Ass'n* v. *Bradley*, 983 F.2d 1460, 1462-63 (1993), which applied an arbitrary and capricious standard of review to evaluate compliance with federal law. See Br. in Opp. 22 (conceding that *Bradley* applied a deferential standard of review). In this case, in contrast, the Fifth Circuit announced that it would conduct "*de novo* review of the state's factfinding process" (even though the text of the statute does not refer to a "factfinding process") and "arbitrary and capricious review of the findings and rates." Pet. App. 11a. The Tenth Circuit has adopted still another approach, reviewing *de novo* "whether the plan is procedurally and substantively in compliance with the requirements of the [Boren Amendment.]" *Amisub (PSL), Inc.* v. *Colorado Department*

of Social Servs., 879 F.2d 789, 795 (10th Cir. 1989), *cert. denied*, 496 U.S. 935 (1990).[1/]

In addition, the lower court's expansive interpretation of the procedural "findings" requirement conflicts with this Court's statements in *Wilder* that the findings requirement is "bare" and "perfunctory." 496 U.S. at 510, 513. Respondents' suggestion (Br. in Opp. 14-17) that the Court did not mean anything by these statements cannot be credited. The majority in *Wilder* concluded that judicial review of the *substantive* adequacy of Medicaid rates is warranted precisely because review of compliance with the "bare" procedural requirements, without more, would render the Boren Amendment "a dead letter." 496 U.S. at 514. If this Court had shared the Fifth Circuit's expansionist vision of the procedural "findings" requirement, that argument would have been nonsensical, because procedural review under the Fifth Circuit's standard involves a wide-ranging, intrusive and *de novo* inquiry into the States' rate-making processes. See Pet. 12-13. If a court, applying a highly demanding *de novo* standard of review, concludes that the State has engaged in an adequate "factfinding process" that has produced sufficient information and analysis to substantiate the conclusion that Medicaid rates are reasonable and adequate, it is hard to imagine how the same court, applying a *deferential* standard

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[1/] Respondents attempt to side-step the disagreement in the courts of appeals by asserting that "*all of the cases, whether describing their review process as 'de novo' or otherwise,*" "ask the question" whether the State possessed "a 'minimum quantum of evidence' to substantiate [the] agency's assurances." Br. in Opp. 22 (emphasis in original). But the courts of appeals are clearly not all "asking the same question," as the plain terms of their discordant opinions make clear. Moreover, it matters a great deal whether the review process is "'*de novo*' or otherwise" where, as here, the court engages in intrusive review of the *quality* of the State's rate-setting process under the guise of determining whether the State has made any findings at all.

of review, could possibly conclude that the rates are substantively inadequate.[2/] Accordingly, the Fifth Circuit's broad interpretation of the "findings" requirement is impossible to reconcile with this Court's decision in *Wilder*.[3/]

3. Respondents repeatedly misstate petitioners' position by attributing to them the view that "a state agency may comply with the findings requirement by merely claiming that it has done so." Br. in Opp. 11-12; see also *id.* at 14-17, Petitioners' position is that the Boren Amendment requires participating States actually to "find" that their rates are reasonable and adequate, and not merely to claim to have done so. It is also petitioners' position that the lower court's expansive definition of the "findings" requirement goes much too far. The issue at this juncture is whether the lower court's approach is incorrect and unreasonable. Respondents do not even attempt to explain how the court's insistence on an extensive "factfinding process" can be derived from the ordinary meaning of the statutory term "find," which is simply "to arrive at (a conclusion)" or to "determine and declare." See Pet. 11 (quoting *Webster's Third New International Dictionary* 852 (1968)).

Respondents suggest that LDHH had essentially no support for its findings as to the adequacy of reimbursement

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[2/] Of course, the rates could well be adequate even if the "factfinding process" did not meet the Fifth Circuit's standard.

[3/] The court of appeals' definition of the scope of the "findings" requirement also conflicts with the Ninth Circuit's decision in *Folden* v. *Washington State Dep't of Social & Health Servs.*, 981 F.2d 1054, 1057 (1992), which recognized that "the finding process does not require any special studies or written findings." In this case, in contrast, the court of appeals held that LDHH "conducted no studies" and did not reduce its analyses to writing. Pet. App. 17a, 21a.

rates. See, *e.g.*, Br. in Opp. 13, 19, 27. The record shows the opposite. The State submitted a lengthy and detailed affidavit from a responsible State official describing the numerous factors the State took into account in evaluating the adequacy of rates. See Appellees' Record Excerpts 31-54 (affidavit of Helene Robinson). The lower courts were required to accept statements in the affidavit as true given the summary judgment posture of the case, and there was no evidence in the record to rebut Robinson's affidavit.

In addition to misstating petitioners' position, respondents erroneously state that "[t]he court of appeals' decision does not dive into the complexities of Medicaid reimbursement methodology or substitute its judgment as to such methodology for that of the state agency." Br. in Opp. 23. In fact, the court of appeals held that "the method by which LDHH promulgated the initial target rates fails the Boren Amendment test." Pet. App. 19a. See also *id.* at 24a (identifying alleged "fallacy in LDHH's rate-setting methodology"). As we have explained, see Pet. 12 n.6, there is in fact no "fallacy." In any event, the lower court, in the guise of determining whether LDHH complied with the simple procedural requirement that it "find" that its rates are adequate, clearly did "dive into the complexities of Medicaid reimbursement methodology" by rejecting Louisiana's basic rate-setting methodology, which has been approved by the federal government and which has been in effect since 1983. In doing so, it once again exceeded the limits that courts respect in reviewing agency action. See *Environmental Action* v. *FERC*, 996 F.2d 401, 407 (D.C. Cir. 1993) (because "[i]ssues of rate design are fairly technical and, insofar as they are not technical, involve policy judgments that lie at the core of the regulatory mission," judicial "review is deferential") (quotation omitted).

Respondents praise the court of appeals because it merely told Louisiana "that it did not do *nearly enough* by way of findings," and that "it must do something more," without specifying what additional actions are required to survive judicial review. Br. in Opp. 18, 19 (emphasis in original). That is no cause for congratulation. Any judicial gloss on the statutory text should provide clear guidance to the States. Instead, the court of appeals has left Louisiana and other States to guess at what might satisfy a court, years after the fact, reviewing one of the State's most important, complex, and expensive programs. Further review is warranted to correct that situation.

4. Respondents assert (Br. in Opp. 6-11) that the petition contains several "perceived misstatements of fact and law." *Id.* at 6. The "misstatements" that respondents identify are not misstatements at all, and, for the most part, are not even relevant to the questions presented for review.

Respondents suggest (Br. in Opp. 9-10) that LDHH did not comply with its own interpretation of the findings requirement — *i.e.*, that LDHH did not actually conclude that its Medicaid rates met the requirements of the Boren Amendment. That suggestion is directly contradicted by the findings of both courts below, which rested on clear supporting evidence. See Pet. App. 32a (LDHH "properly set forth findings for the decision it made in adopting changes in its plan during the years 1985, 1986, 1988, 1989 and 1990"); *id.* at 7a (LDHH "made its findings and submitted assurances to HCFA for approval of its initial Medicaid plan in 1984 *and all subsequent amendments to the plan's reimbursement rates*") (emphasis added).

Respondents also assert (Br. in Opp. 8-9) that HCFA has not approved LDHH's 1988 amendment. That point was entirely irrelevant to the issues decided by the court of

appeals. That court instead criticized the State's basic rate-setting methodology, which had been approved by HCFA in 1983. HCFA's disapproval of the 1988 amendment did not call into question the propriety of the basic methodology, but questioned only whether the amendment had adequate support. HCFA's disapproval is not yet final and is now the subject of administrative review.

Respondents take issue with petitioners' statement that Louisiana's Medicaid Plan provides an incentive for cost control. See Br. in Opp. 6-7. Under Louisiana's Medicaid system, hospitals are fully reimbursed only if the rate at which their costs increase is less than or equal to a "target rate." The unrebutted record evidence was that the target rates were intended to and did provide an incentive for hospitals to contain their costs.

Respondents' assertion (Br. in Opp. 7) that there is no "credible" evidence in the record that LDHH froze Medicaid rates because of the State's depressed economy is incorrect. The responsible LDHH official so testified in a sworn affidavit. See Appellees' Record Excerpts 39-40; 42-26. The affidavit also rebuts respondents' assertion (Br. in Opp. 8) that there is no record support for petitioners' statement that the national cost index was producing target rate increases that were too large for Louisiana. See Appellee's Record Excerpts 42-45. Contrary to respondents' assertion (Br. in Opp. 7), the court of appeals did not reject the affidavit as "largely discredited" by deposition testimony. Instead, the court of appeals accepted the affidavit at face value, as it was required to do given the summary judgment posture of the case, but concluded (erroneously in petitioners' view) that the extensive activity described in the affidavit was legally insufficient to satisfy the findings requirement. See Pet. App. 19a-20a n.15.

5. The States' Brief makes a compelling case for overruling *Wilder*. The vague terms of the Boren Amendment are not susceptible of coherent and consistent judicial enforcement, and *Wilder* has resulted in protracted, inefficient litigation in a field where federal courts have very little, if any, expertise. See States' Br. 9 and n.9. Respondents contend (Br. in Opp. 24-25) that this case is not an appropriate vehicle for reconsidering *Wilder* because the court of appeals considered only petitioners' compliance with the procedural requirements of the statute. In fact, *Wilder* held that *both* the procedural and substantive requirements of the Boren Amendment are enforceable under 42 U.S.C. § 1983, and for this purpose did not distinguish between them. There is no impediment in this case to a decision overruling *Wilder*.[4/]

Moreover, if the Court were to reconsider *Wilder*, it could decide that, in the light of *Suter* v. *Artist M*, 112 S. Ct. 1360 (1992), there should be no Section 1983 actions under the Boren Amendment or that there should be only substantive review, with the burden on the plaintiffs to offer evidence (and none was offered here) that reimbursement rates are inadequate within the meaning of the Amendment. Either disposition would require that the decision below be vacated.

[4/] Nor is it true that the dissenting justices in *Wilder* agreed that the procedural requirements of the Boren Amendment were judicially enforceable; the dissent said only that "respondent *arguably* may bring a 1983 action to require" compliance with the Amendment's procedural requirements. 496 U.S. at 527 (Rehnquist, J., dissenting) (emphasis added).

CONCLUSION

For the foregoing reasons, and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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